

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

801

Brief for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,714

UNITED STATES OF AMERICA,
Appellee

v.

HAROLD SMITH,
Appellant

Appeal From The United States District Court For
The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 26 1970

Nathan J. Paulson
CLERK

March 27, 1970

DONALD E. BILGER
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorney for Appellant
(Appointed by this Court)

INDEX

QUESTIONS PRESENTED.	(iii)
JURISDICTIONAL STATEMENT	1
REFERENCES TO RULINGS.	1
STATEMENT OF THE CASE.	2
STATUTE INVOLVED	9
STATEMENT OF POINTS.	10
SUMMARY OF ARGUMENT.	11
ARGUMENT	13

I. The Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that there was no probable cause for Smith's arrest and search, ...13

II. The Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that the recovery of his companion's (Stewart) gun was the result of an illegal search, thus preventing the use of Stewart's

illegally recovered gun as probable cause for Smith's arrest and search. . .	.16
III. The Trial Court committed reversible error in refusing to suppress the evi- dence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that even assuming <u>arguendo</u> Stewart's gun was re- covered legally, there was no probable cause for Smith's arrest and search. . .	.20
CONCLUSION	.22

TABLE OF CASES

<u>Bailey v. United States</u> , 389 F.2d 305.	.13
<u>Beck v. State of Ohio</u> , 379 U.S. 89	.13
<u>Henry v. United States</u> , 361 U.S. 98.	.14
<u>Hinton v. United States</u> , No. 22,068 U.S. App. D.C., decided October 14, 1969.	.22
<u>Jackson v. United States</u> , 302 F.2d 194, 112 U.S. App. D. C. 260.	.14
<u>Johnson v. United States</u> , 333 U.S. 10.	.14
<u>Kelley v. United States</u> , 298 F.2d 310, 111 U.S. App. D. C. 396.	.15
* <u>Sibron v. State of New York</u> , 392 U.S. 40	13, 14 18, 19
* <u>Terry v. Ohio</u> , 392 U.S. 1.	11, 16, 17, 18, 19, 21, 22
<u>United States v. Di Re</u> , 332 U.S. 581	.14
<u>Walder v. United States</u> , 347 U.S. 62	.19

*Cases chiefly relied upon are marked by asterisks.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that there was no probable cause for Smith's arrest and search?

2. Whether the Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that the recovery of his companion's (Stewart) gun was the result of an illegal search, thus preventing the use of Stewart's illegally recovered gun as probable cause for Smith's arrest and search?

3. Whether the Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that even assuming arguendo Stewart's gun was recovered legally, there was no probable cause for Smith's arrest and search?

This case was not previously before this Court under the same or similar title.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,714

UNITED STATES OF AMERICA, Appellee

v.

HAROLD SMITH, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction and sentence in the United States District Court for the District of Columbia. This Court has jurisdiction under 28 U.S.C. 1291.

REFERENCES TO RULINGS

None

STATEMENT OF THE CASE

On February 12, 1969, a two count indictment was filed in the United States District Court for the District of Columbia charging George E. Stewart and Harold Smith each with one count of carrying "openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law," in violation of Title 22, Section 3204 of the District of Columbia Code (R.1).

Smith and co-indictee Stewart entered pleas of not guilty to the charges on February 28, 1969, (R.3). On July 11, 1969, a "Joint Motion to Dismiss Indictment or Alternately to Suppress Evidence" was heard before and denied by The Honorable George L. Hart, Jr. (R.14A) and on August 26, 1969, Harold Smith and George Stewart were tried before The Honorable June L. Green (R.31) and each found guilty of carrying a dangerous weapon (R.21^{1/}). The judgment of conviction was filed on October 30, 1969, sentencing Smith to imprisonment for a period of two

^{1/} The motion to suppress the gun recovered from Smith and Stewart was renewed at Trial by defense counsel (R.31-62).

years to six years (R.28). From that judgment, an appeal is taken. A notice of appeal to this Court was timely filed by appellant on October 29, 1969 (R.26).

Officer Walter J. Henja of the 1st District, Metropolitan Police Department, testified that on December 5, 1968, at approximately 5:00 a.m., in response to a radio call, he responded to 1331 H Street, N. W., where he was met by one Ernest Barbareviech, a building guard at the above address (R.31-13, 14). He testified that upon being told by Mr. Barbareviech that he had seen two individuals "casing" the Capitol Garage, Officer Henja asked Mr. Barbareviech to get inside the scoutcar to positively identify the two individuals (R.31-14). Officer Henja further testified that he observed Smith and Stewart standing at the corner of 13th & H Streets, N. W., and that as his scoutcar approached, Smith and Stewart walked in a hurried manner south on 13th Street toward G Street (R.31-14).

Officer Henja testified that he suddenly pulled his scoutcar into an alley in the 700 block of 13th Street at about 25 miles per hour, blocking

the sidewalk and preventing Smith and Stewart from continuing south on 13th Street (R.18-19, 20).

The scoutcar was approximately six feet in front of Stewart as it entered the alley (R.31-26).

Officer Henja testified that at that point both he and Mr. Barbareviech quickly got out of the car, with Officer Henja shouting "Hold It" to Smith and Stewart (R. 31-23, 16).

Officer Henja stated that he told Stewart to take his hand out of his pocket but when Stewart hesitated for a second or two he grabbed Stewart's wrist and reached into the pocket in which Stewart had his hand and removed a gun (R.31-16, 28).

Officer Henja further testified that Smith and Stewart stopped at his command and made no attempt to run away (R.31-26) and that there was nothing suspicious about either Smith's or Stewart's clothing (R.31-27).

Officer Henja testified that his attention was directed towards Stewart and that he did not pay attention to Smith although he believed that Mr. Barbareviech was detaining Smith (R.31-32). Only after Officer Henja stated that he had arrested

Stewart, after recovering Stewart's gun, (R.31-32) and the paddy wagon had arrived upon the scene, did his attention return to Smith (R.31-32). According to Officer Henja, Smith was placed into the paddy wagon and then was searched, with Officer Lovelady placing his hand into Smith's pocket, after which Smith was placed under arrest (R.31-32, 38).

Officer Henja further testified that at the point at which he stopped Smith and Stewart he had no probable cause to arrest them based upon the information he had received (R.31-21), and that he did not have cause to believe that Smith and Stewart were carrying weapons based upon the information that they were "casing" the Capitol Garage (R.31-40).

Finally, Officer Henja stated that his gun remained in his holster until he took the gun out of Stewart's pocket (R.31-68).

Ernest Paul Barbareviech, a plainclothes guard at the Harold Square Building, 1331 H Street, N. W., testified that on December 5, 1968, at approximately 5:00 A.M., he observed two individuals standing in front of the Capitol Garage, looking at passing cars and the cashier's booth (R.31-41).

Barbareviech stated that he felt there was going to be a holdup and so he called the police (R.31-41).

Barbareviech stated that he observed the two individuals enter the White Tower restaurant at 13th & H Street, N. W., and when Officer Henja arrived he related to him the above and then entered the police scoutcar (R.31-42). Barbareviech further testified that as he left the scoutcar, upon entering the alley and blocking Smith and Stewart, he and Officer Henja had their guns drawn (R.31-52). Barbareviech stated that although Officer Henja did not instruct him to hold Smith, Barbareviech assisted Officer Henja by doing so (R.31-52). Barbareviech further testified that he told Smith, at gunpoint, to move against the scoutcar and place his hands on the scoutcar (R.31-54). Barbareviech then proceeded to pat down Smith (R.31-54) and when the paddy wagon arrived he turned Smith over to the other police officers, who proceeded to take Smith to the paddy wagon, whereupon a police officer opened Smith's clothing and removed a gun (R.31-55).

Doyme K. Lovelady, a Sergeant assigned to the 1st District of the Metropolitan Police, testified

that on December 5, 1968, at approximately 5:00 A.M., he received a call for assistance over the scoutcar radio (R.31-57). Officer Lovelady stated that when he arrived Officer Henja had placed Stewart under arrest and he (Lovelady) then proceeded to search Smith (R.31-58, 60). Officer Lovelady further stated that both Officer Henja and Barbareviech had their guns out (R.31-60). Officer Lovelady stated that he then placed Smith under arrest when Smith was placed in the paddy wagon (R.31-61).

George E. Stewart testified that on December 5, 1968, at approximately 5:00 A.M. he and Smith, after spending approximately an hour (R.18-30) at the White Tower restaurant at 13th & H Streets, N. W., left and proceeded South on 13th Street to a car which they had parked at 13th & F or G (R.18-26). As they walked South on 13th Street, Stewart stated that a police car cut across the sidewalk, blocking their path, and that the police officer got out of the car with his pistol drawn and told them to stop (R.18-26). Stewart testified that the Officer (Henja) then told him to put his hands up and the officer proceeded to put his hands into Stewart's pockets, recovering a pistol (R.18-26).

Stewart testified that it was cold (R.18-27) that morning, that he was wearing a full length coat (R.18-30) and that he and Smith were walking to the car they had parked because it was so cold (R.18-27).

Harold Smith testified that on December 5, 1968, at approximately 5:00 A.M. he and Stewart were walking South on 13th Street when a squadcar pulled in front of them and a uniformed officer (Henja) and a plainclothesman (Barbareviech) jumped out with pistols drawn and told them to "Hold It" (R.18-31). Smith also stated that the plainclothesman (Barbareviech) placed a pistol in Smith's face and stated that if Smith moved he would shoot him. Smith testified that Barbareviech then patted him down but did not recover a pistol (R.18-31) and that a police officer, arriving on the scene, also patted Smith down, but recovered nothing (R.18-32). Smith further stated that as he was being placed into the paddy wagon, a Sergeant (Lovelady) grabbed Smith and placed his hand into Smith's pocket and took out a pistol (R.18-32).

Smith also testified that Stewart and he went to the Capitol Garage to get some cigarettes, but

discovered the door to the room where the cigarette machine was located to be locked and so after about thirty seconds returned to the White Tower (R.18-34, 35).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 3204, provides:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment

for not more than ten years."

STATEMENT OF POINTS

1. The Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that there was no probable cause for Smith's arrest and search.

2. The Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that the recovery of his companion's (Stewart) gun was the result of an illegal search, thus preventing the use of Stewart's illegally recovered gun as probable cause for Smith's arrest and search.

3. The Trial Court committed reversible error in refusing to suppress the evidence that Smith was carrying a gun and in subsequently admitting said gun into evidence in view of the fact that even assuming arguendo Stewart's gun was recovered legally, there was no probable cause for Smith's arrest and search.

SUMMARY OF ARGUMENT

1. Although Officer Henja admitted he had no probable cause to arrest Smith and his companion, Stewart, in fact they were arrested at the point Officer Henja and Mr. Barbareviech blocked the sidewalk with the police scoutcar, preventing the passage of Smith and Stewart, told them to "Hold It", and alighted from the police scoutcar with their guns drawn. The search, incidental to the illegal arrest, was in violation of the Fourth Amendment and thus the gun recovered from Smith by the illegal search should not have been admitted into evidence.

2. Assuming arguendo that the arrest did not occur at that point in "1" above, and that Officer Henja merely sought to investigate rather than arrest Smith and Stewart, his manner of detention of Smith and Stewart, and his search of Stewart by thrusting his hand into Stewart's pocket were in violation of the Fourth Amendment and specifically the guidelines of Terry v. Ohio, 392 U.S. 1. The gun illegally recovered from Stewart served as the basis for the officer's determination that probable cause existed to arrest Smith. However, the gun

recovered from Stewart was the fruit of an illegal search, and cannot serve as the basis for probable cause for Smith's arrest. Since Smith's arrest was without probable cause, it was illegal as was the search incidental to the illegal arrest. Therefore, the gun recovered from Smith should not have been admitted into evidence.

3. Assuming arguendo that the arrest did not occur at that point in "1" above, and further that the gun was recovered legally from Stewart, there still was not probable cause to arrest Smith because the arresting officer could not reasonably have concluded that a felony had been committed by Smith merely because his companion, Stewart, had a gun. Nor could a search of Smith be undertaken by the police prior to an arrest of Smith. Therefore, the arrest of Smith was without probable cause and the search incidental to this illegal arrest was illegal; or the search of Smith preceded the arrest, which was also illegal. Thus, the gun recovered from Smith should not have been admitted into evidence.

ARGUMENT

I

The Trial Court Committed Reversible Error In Refusing To Suppress The Evidence That Smith Was Carrying A Gun And In Subsequently Admitting Said Gun Into Evidence In View Of The Fact That There Was No Probable Cause For Smith's Arrest And Search

The Fourth Amendment to the Constitution of The United States decrees that people have the right "to be secure in their persons. . .against unreasonable searches and seizures. . .and no warrants shall issue, but upon probable cause...". It has long been held that an arrest may only be prosecuted without a warrant so long as the police officer has reasonable belief that a felony has been or is actually being committed and that the party arrested is guilty of said criminal act. Sibron v. New York, 392 U.S. 40, 53 (1968); Bailey v. United States, 389 F.2d 305, 308-309 (D.C. Cir. 1967); Beck v. State of Ohio, 379 U.S. 89, 91 (1964). Any search made incident to such an arrest would therefore comply with the Fourth Amendment requirements of probable cause. Id.

Thus, the arresting officer must possess a reasonable foundation for the belief that a felony

has in fact been committed by the defendant. Probable cause exists only if the officer under the "particular circumstances conditioned by his observation and information and guided by the whole of his police experience, reasonably would have believed a crime had been committed by the person he arrested." Jackson v. United States, 302 F.2d 194, 196 (1962).

Therefore, an arrest and search cannot be based upon suspicion or surmise and the search clearly may not precede an arrest and serve as its ultimate justification. Sibron, 392 U.S. 62-3; Henry v. United States, 361 U.S. 98, 102-103 (1959) and Johnson v. United States, 333 U.S. 10, 15-17 (1948). "[A] search is not to be made legal by what it subsequently uncovers. In law, it is good or bad when it starts and does not change character from its success." United States v. Di Re, 332 U.S. 581, 595 (1948).

It is clear from the facts presented supra that Officer Henja did not have probable cause to arrest Smith and Stewart when he stopped them; in fact, Officer Henja himself stated that he realized that he did not have probable cause to arrest Smith

and Stewart. Further, Smith and Stewart reasonably believed that they were arrested when the scoutcar cut across the sidewalk in front of them, blocking their passage, Officer Henja told them to "hold it", and both Officer Henja and Mr. Barbareviech alighted from the scoutcar with their guns drawn. The fact that Officer Henja stated he merely desired to speak to Smith and Stewart does not mitigate the fact that his actions constituted an arrest. As stated in Kelley v. United States, 298 F.2d 312 (1961) "it is not necessary that there be an application of actual force or manual touching of the body or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting and submits to the consequence."

Since Smith and Stewart were arrested at the moment that they were stopped, and since Officer Henja himself admitted he did not have probable cause at that time, the searches of Smith and Stewart incidental to these illegal arrests are also illegal and the guns recovered should not have been admitted into evidence by the Trial Court.

II

The Trial Court Committed Reversible Error In Refusing To Suppress The Evidence That Smith Was Carrying A Gun And In Subsequently Admitting Said Gun Into Evidence In View Of The Fact That The Recovery Of His Companion's (Stewart) Gun Was The Result Of An Illegal Search, Thus Preventing The Use Of Stewart's Illegally Recovered Gun As Probable Cause For Smith's Arrest And Search

In Terry v. Ohio, 392 U.S. 1 at 30-31 (1968),

The United States Supreme Court stated:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of this encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area, to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. (Emphasis added)

Although Officer Henja testified that his intention was merely to stop Smith and Stewart to

talk with them, his detention and search of Stewart was not in accordance with the guidelines presented in Terry and therefore the search of Stewart may not be justified by reliance upon Terry. First, Officer Henja did not personally observe any unusual conduct by Smith and Stewart, which would lead him to reasonably believe that (1) Smith and Stewart were involved in criminal activity and (2) that they were armed. Rather, Officer Henja relied upon the conclusion of an inexperienced building guard (Barbareviech) without reference to the underlying reasons for the guard's conclusion. Moreover, the arresting officer's personal observations consisted solely of observing Smith and Stewart standing on a street corner in front of a restaurant they had just left and watching them walk in a hurried manner down 13th Street, N. W. These personal observations could not reasonably have led Officer Henja to believe Smith and Stewart were involved in criminal activity. Further, Officer Henja testified that he did not have cause to believe Smith and Stewart were carrying weapons based upon the information that they were "casing" the Capitol Garage.

Further, the scope of Officer Henja's search of Stewart was clearly unrelated to the circumstances which would have justified the detention of Stewart and Smith in the first place. The United States Supreme Court in Sibron v. New York, 392 U.S. 40 at 65 pointed out the necessity for limitation upon the scope of a search under the Terry theory:

Even assuming arguendo there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments for assaults. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. . . .The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception - the protection of the officer by disarming the potentially dangerous man. (Emphasis added)

Since the arresting officer in the present case thrust his hand into the pocket of Stewart, as in Sibron, without first patting down the outer

clothing of Stewart, the search of Stewart was in violation of the Fourth Amendment for it exceeded the standards of reasonableness regarding the scope of search laid down by the Supreme Court.

According to The United States Supreme Court in Walder v. United States, 347 U.S. 62, 64-65 (1954),

The Government cannot violate the Fourth Amendment...and use the fruits of such unlawful conduct to secure a conviction...Nor can the Government make indirect use of such evidence for its case...or support a conviction on evidence obtained through leads from the unlawfully obtained evidence...All these methods are outlawed and convictions obtained by means of them are invalidated because they encourage the kind of society that is obnoxious to free men.

Since Officer Henja failed to follow the standards of reasonableness provided by Terry and Sibron, the recovery of the gun from Stewart was the result of an illegal search. The fruit of an illegal search -- Stewart's gun -- cannot be used as the basis for probable cause to arrest Smith. Since there was no probable cause, the arrest of Smith was illegal as was the search incidental to this arrest. Thus the gun recovered from Smith should

not have been admitted into evidence.

III

The Trial Court Committed Reversible Error In Refusing To Suppress The Evidence That Smith Was Carrying A Gun And In Subsequently Admitting Said Gun Into Evidence In View Of The Fact That Even Assuming Arguendo Stewart's Gun Was Recovered Legally, There Was No Probable Cause For Smith's Arrest And Search

The testimony of the Government's witnesses concerning the police action taken towards Smith following the recovery of Stewart's gun and Stewart's arrest was contradictory; either Smith was searched and then placed under arrest, or placed under arrest and then searched.

According to the testimony of Officer Henja, the former occurred. Smith was placed into the paddy wagon and searched by Officer Lovelady who placed his hand into Smith's pocket, recovering the pistol. Officer Lovelady then arrested Smith. The fact that Smith was searched before his arrest was confirmed by the testimony of Officer Lovelady himself who stated that he proceeded to search Smith before he had arrested him. Further, Officer Henja pointed out that Smith was not just patted down, but rather

that Officer Lovelady placed his hand into Smith's pocket. In confirmation of Officer Henja's testimony, Mr. Barbareviech^{2/} stated that when Smith was searched at the paddy wagon, Smith's clothing was opened by a police officer and a gun was recovered. Thus the action of Officer Lovelady cannot be justified on the rationale of Terry. This thorough search of Smith before arrest, including an examination of his pockets rather than a pat down as in Terry, was unconstitutional as it was in violation of the Fourth Amendment. Therefore, the gun recovered by this illegal search should not have been admitted into evidence.

If the latter occurred, namely that Smith was arrested and then searched, then recovery of the gun from Smith still violates the Fourth Amendment, for the search was incidental to an arrest which was illegal because of the lack of probable cause. The mere fact that a gun was recovered from Smith's companion is not a reasonable

^{2/} There is no testimony that Mr. Barbareviech informed the police officers that he had felt a gun on Smith, thus Barbareviech's knowledge cannot serve as justification for the search of Smith before Smith's arrest.

basis upon which to conclude that Smith had committed a crime.^{3/} The fact that Smith's companion was found with a gun may have been adequate reason for the officer to pat down Smith as prescribed in Terry; but it is not a sufficient basis for probable cause to arrest Smith or to conduct a search beyond patting down the outer clothing. Since the gun was recovered from Smith by a search incidental to an illegal arrest, the gun should not have been admitted into evidence.

CONCLUSION

Wherefore, appellant respectfully prays that the judgment of conviction be reversed, and that the case be remanded with directions to enter a judgment of acquittal.

Respectfully submitted,

DONALD E. BILGER
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorney for Appellant
(Appointed by this Court)

^{3/} See Hinton v. United States, No. 22,068 U.S. App. D.C., decided October 14, 1969, which sustains the proposition that the arrest of an individual does not constitute probable cause to arrest the individual's companion.

Reply Brief for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,714

UNITED STATES OF AMERICA,
Appellee

v.

HAROLD SMITH,
Appellant

Appeal From The United States District Court For
The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

June 8, 1970

FILED JUN 8 1970

Nathan J. Paulson
CLERK

DONALD E. BILGER
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Appellant
(Appointed by this Court)

INDEX

REPLY ARGUMENT	1
--------------------------	---

REPLY TABLE OF CASES

* <u>United States v. Cunningham</u> , No. 23,073 , U.S. App. D.C., decided April 1, 1970	1, 2
--	------

*Cases chiefly relied upon are marked by asterisks.

REPLY ARGUMENT

In Footnote 14 of its brief, the Government dismisses Smith's initial argument that:

(1) Smith and Stewart were arrested when Officers Henja and Barbarevich blocked the sidewalk with the police scout car, preventing the passage of Smith and Stewart, told them to "hold it" and alighted from the police scout car with their guns drawn;

(2) The arrest was without probable cause, as conceded by Officer Henja in his testimony;

(3) The search incidental to the illegal arrest was in violation of the Fourth Amendment and

(4) Therefore, the gun recovered from Smith should not have been admitted into evidence.

Without citing precedent, the Government simply states that the question of arrest without probable cause is "out of order" and is "not the issue".

It is difficult to understand the Government's position in light of United States v. Cunningham, No. 23,073, U.S. App. D.C., decided April 1, 1970. In Cunningham, a police

officer and a security officer for an apartment complex were investigating a reported burglary when they noted two men carrying a coffee table out of another building in the complex. Their distinctive clothing matched that described for two men who had earlier been seen going in and out of the buildings. The officers entered the police cruiser and raced to the automobile into which the two men were placing the table. With guns drawn, they immediately placed appellants under arrest and searched their vehicle.

In its argument before this Court, the Government contended that the Court need not consider the question of probable cause since, regardless of whether or not probable cause existed, the conduct of the two men was suspicious enough to justify a "stop and frisk" as prescribed in Terry v. Ohio, 392 U.S. 1 (1968). This Court stated that the Government's view meant that since "a frisk would have disclosed [appellant's] concealed pistol, [and] the officers would then have had probable cause to arrest and search both men...Therefore, ...an arrest and incident search (which were not permissible in the known circumstances) should be held valid if a frisk (which was justified) would eventually have produced the same incriminating evidence." The Court rejected the Government's

sylllogism stating that "...a lack of probable cause cannot be made up in hindsight by a hypothetical variation in the basis on which a search was conducted."

Comparison of the Government's argument in Cunningham with the argument presented here reveals a controlling similarity. There, as here, the Government, to succeed, must prevail in its argument that arrest without probable cause is not an issue. This is especially true in this case, since Officer Henja testified that no such probable cause existed.

The Government, on pages 8 and 9 of its brief, states that "the fact that Henja placed his hand into the pocket of Stewart without first patting him down is meaningless. It would be a ridiculous requirement if the law were to compel officers to pat the outer surface on a suspect's clothing in order to feel with the fingers what is, in effect, visible to the naked eye." [Emphasis Supplied] The Government further states that Smith's reliance upon Sibron v. New York, 392 U.S. 40 (1968), is misplaced and that Terry v. Ohio is controlling.

There are two basic weaknesses in the Government's argument:

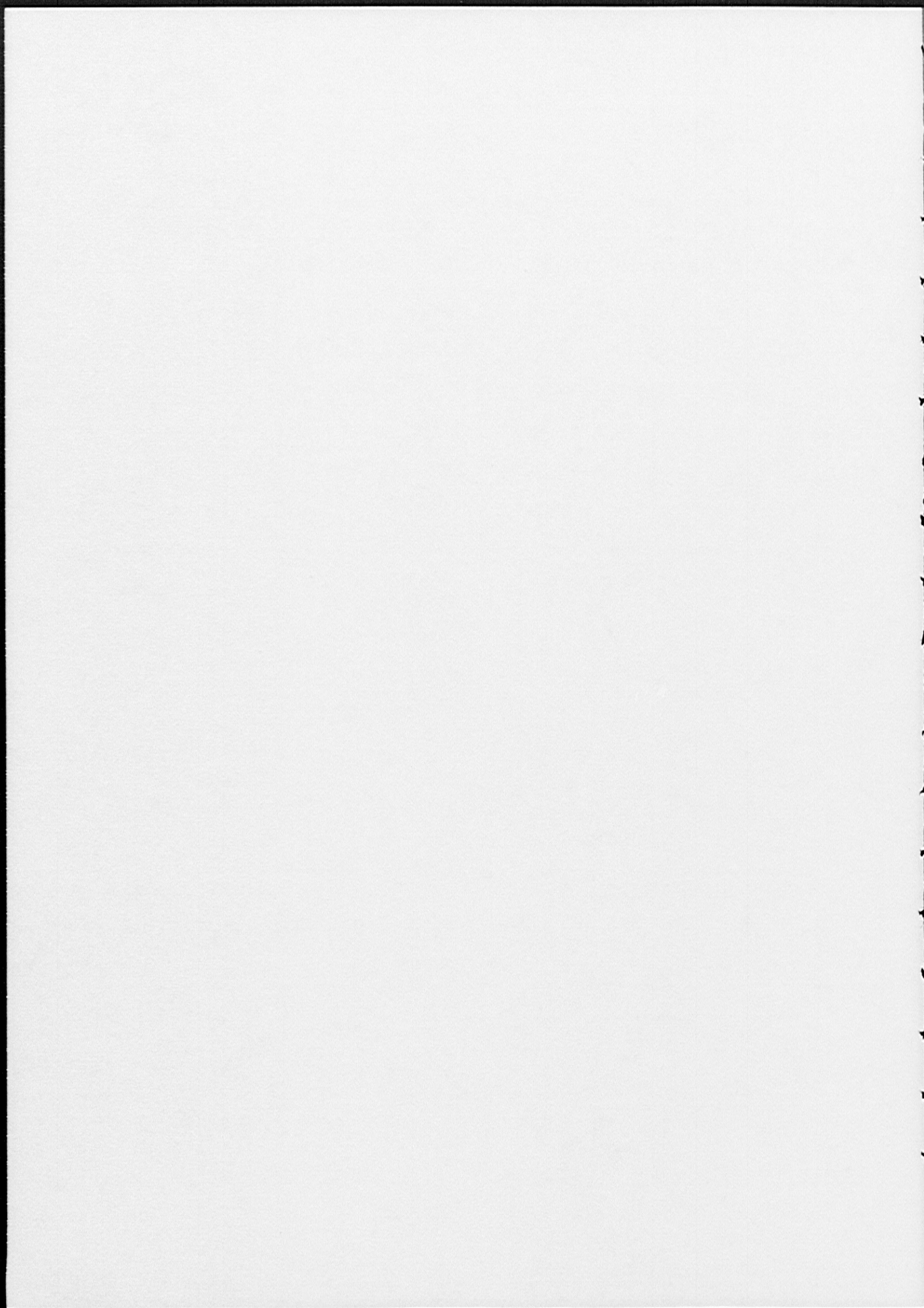
- (1) Both Terry v. Ohio and Sibron v. New York, which, in effect, defined the scope of search

permitted by Terry, are explicit in limiting the search to the outer clothing of the individual. In fact, the Sibron decision was based upon the distinction made by the United States Supreme Court between patting the outer clothing of the suspect and thrusting one's hand into the suspect's pocket. The Court held that the officer's placing of his hand into the pocket "...was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception - the protection of the officer by disarming the potentially dangerous man." The Government's characterization of the patting of the outer clothing as a "ridiculous requirement" in view of these two recent United States Supreme Court decisions defining the law of "stop and frisk" is difficult to comprehend. In fact, the Government's contentions are diametrically opposed to the "stop and frisk" law as defined by the Supreme Court.

- (2) The Government has attempted by implication to insert facts into its brief (page 9) which have no basis in the record, namely that the gun

recovered from Stewart was visible. Nowhere in the record is there any evidence presented by Officer Henja or any other individual indicating that Stewart's gun was visible. In fact, the testimony is to the contrary, for Officer Henja only observed a bulge in Stewart's overcoat pocket. Thus, unless the Government is contending that Officer Henja had the ability to see through Stewart's clothing, it is clear that the standard presented by Sibron, limiting the scope of search, is applicable and is not a "ridiculous requirement". The appellants' reliance upon Sibron is totally justified under the circumstances of this case.

Finally, the Government relies upon the statement of the Court at the Hearing of the Motion to Suppress that "the arrest and search of Smith was justified by the preceding arrest of Stewart." However, in Hinton v. United States, No. 22,068, U.S. App. D.C., dated October 14, 1969, this Court sustained the proposition that an arrest of an individual does not constitute probable cause to arrest the individual's companion. Thus, even assuming that the gun recovered from Stewart was done so legally, that does



not constitute sufficient probable cause to arrest Smith.

Respectfully Submitted,

DONALD E. BILGER
1150 Connecticut Avenue
Washington, D.C. 20036
Attorney for Appellant
(Appointed by the Court)